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ON

IDENTITY OF METHOD

IN THE SEARCH FOR TRUTH.

JURISPRUDENCE.

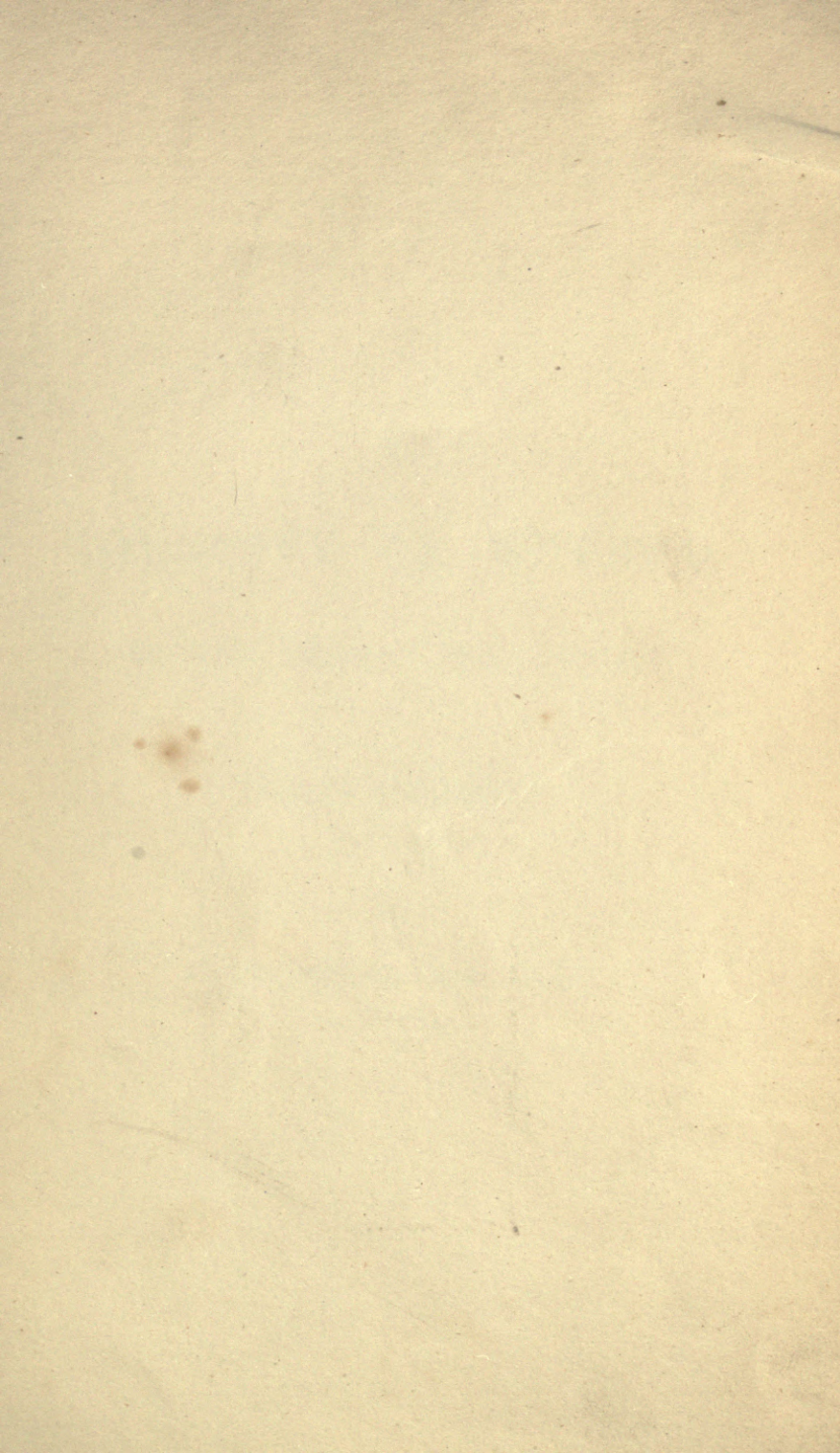
BY

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SERJEANT-AT-LAW.

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JOHN TOZER, M.A., LL.D.,

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ON IDENTITY OF METHOD IN THE SEARCH FOR TRUTH.

JURISPRUDENCE.

It is now two centuries and a half since Francis Bacon pointed out what the process is by which Truth is successfully sought, or discovered although unsought.

That process was called the new method. It was new to the theories of Psychologists, but Bacon lived in an age of inductive labour, and, to inductive labourers, the fact that the observations that they were daily and hourly indefatigably making, formed the basis of the knowledge that they sought, could not fail to be at once recognized as soon as the oracle had spoken.

To men like Des Cartes, whose scientific labours called for deductive processes only, the truth or falsehood of Bacon's views was not material, and thus there were those who dissented from them. If there is little of such dissent now avowed, there are assumptions that involve it, and which impede the operation of Inductive method in more than one of the subjects to which its careful application is essential.

It might have been well if the term science had been limited to subjects in which the phenomena can be subjected to precise numerical measurement; whether because, as in astronomy, nature is herself constantly reproducing them with undeviating accuracy—or whether because, as in chemistry, she allows them to be reproduced by those who

have learnt the laws of their recurrence. We speak, however, of the science of Jurisprudence—the science of Political Economy; subjects in which the nearest approach to numerical accuracy is to be found in the columns of a statistical table—in which the facts are modified by passions, predilections, sympathies and prejudices—in which the balance and the micrometer can be no longer used—in which we can neither make experiments at pleasure, nor watch the operation of nature's laws for the appearance of the phenomena, whose happening we can with confidence predict.

The question is: Is the method of arriving at truth the same in such subjects as in those of which Astronomy and Chemistry are types?

By comparing the several steps in the method of seeking truth as employed in Science of numerical accuracy, with processes that find their way into operation in any less certain science with which we wish to deal, we discover the necessity for employing the true method, and we find that error is inevitably introduced by any departure from it.

It may be taken as now universally admitted, that we cannot arrive at knowledge on any subject without employing the senses to observe the phenomena that belong to it.

The share that observation and experience take in the process of arriving at truth, and the order in which their action is called for, is subjected to controversy; but if it be taken that the pursuit of knowledge begins with the observation of appearances, great variety of opinion is admissible as to the part taken by the mind in arriving at a knowledge of facts from observed appearances, at laws of the phenomena from facts, and at laws of causation as far as they can be ascertained.

Taking the opinions as actually expressed by sound scientific reasoners, we find it held: That the mind is a blank on which the senses write the tale of knowledge from its earliest phrase.

That the mind is stored with fundamental ideas, which the senses call into exercise.

That "the mind has been already touched by a celestial hand, and when plunged in the colours that surround it, it comes forth covered with a glorious pattern."

A belief in either of these propositions may coexist with the conviction that the Skill, Invention and Imagination that are used to frame an hypothesis, must operate on materials that the senses have assisted in accumulating—that such hypothesis cannot be treated as a fact, or as an established law, until it has been verified by additional experience—and that it must be at once abandoned, if proved by such experience to be unsound.

It is the entire or partial disregard of these principles that in jurisprudence, as in other subjects, leads to error.

In applying the Baconian method to sciences, such as jurisprudence, that are not of numerical accuracy; it is necessary to consider at what we can arrive.

We cannot acquire the ability to predict with certainty the happening of a particular event in a particular case; nor to measure with an approach to accuracy the probability that such event will happen; but we can ascertain what the events are that tend to occur, and, with more or less accuracy, fix the limits within which that probability must lie.

We cannot enunciate a general law that will enable us to say that a particular family settlement will be made to contain particular provisions, nor that a particular person will become the owner of a particular estate; but we can say what the provisions are that there is a tendency to introduce into such settlements; we can say that there is an almost universal eagerness to acquire the ownership of land; that there is a tendency to display a seeming ownership when the real ownership has passed away, when its heart has been eaten out by mortgages and jointures.

We cannot say that a particular house will be destroyed by an incendiary fire, or that a particular ship will be scuttled;

but we can say that the act of prudence which diffuses the loss arising from inevitable accident has a tendency to produce loss for purposes of fraud and profit.

It is experience that acquaints us with the existence of these tendencies; not exclusively the experience of lawyers, but principally so. Lawyers contrive the means by which the contracts and arrangements that men are inclined to make with each other are carried out, conduct the contests to which they lead, and investigate the facts of the case when an injury has been inflicted.

The hypotheses, more or less erroneous, by which jurisprudence is affected are such as these:

That there is a code of Natural Law, of which the mind is intuitively cognizant, and that Municipal and International Law are deductions from its principles.

That Moral Philosophy is a Science from whose principles Jurisprudence must be deduced¹.

¹ "Poser les principes et voir les cas se plier comme d'eux-mêmes" is a method which Montesquieu, no doubt, believed that he was employing. So Locré, *Commentaire et complément des codes Français*,

"toujours prendre pour point du départ les règles premières et essentielles, les principes les élémens enfin de la science."

And Pescatore,—

"Chiedere alla metafisica le prime nozioni sull' organismo morale e giuridico, e con queste nozioni studiare il diritto, non quale si concepì con false astrazione in uno stato che non esiste e non può esistere, ma quale realmente governa gli uomini e le Società: decomporre l'ufficio e il modo di azione nella varie sfere che essa governa: e nella sfera della vita civile distinguere l'elemento giuridico razionale, l'elemento giuridico positivo e il vero rapporto che unisce e contempera i due termini; separare nella giurisprudenza la scienza dall' arte, segnare il limite in cui la scienza finisce e l'arte incomincia, stabilire il principio scientifico qual supremo regolatore dall' arte, e a questo fine costruire un sistema compiuto coi principii del gius comune, ossia della ragion giuridica naturale incui sia data *a priori* la soluzione di tutti i casi giuridici—tali sono gl' intendimenti della logica della diritto.

"La legge morale, rivelazione dell' infinito, risplende qual parte primaria e dominante nell' universo intelligibile: e da essa pure scaturisce la fonte d'ogni diritto. Ma non per questo la logica del diritto si dovrà costituire in un sistema di alta filosofia." *Essa interroga Platone e Kant.*—LOGICA DEL DIRITTO.

That by codifying laws you necessarily substitute clearness, consistency, and simplicity for obscurity, confusion, and complexity¹.

These opinions are more frequently tacitly assumed than avowed. They seem to be perversions of the fact, that there are maxims and principles that are properly called *juris praecepta*, as having been assented to by all civilized men.

With these maxims the rules of jurisprudence must accord, but they are too general to enable inductive labour in particular subjects to be dispensed with, and if they could be combined into a science it would be as a consequence of the results which that labour produces.

Codes of Municipal and International Law must deal with a range of subjects, our knowledge as to the several parts of which is in very different states of advancement. To make every part clear, consistent, and simple, the first step is to frame definitions that are complete, certain, and unambiguous—true when applied to any particular case, and adequate to meet every possible contingency. This first step is an impossible one. A code, in the present state of our knowledge, must in fact be a mere bundle of hypotheses; some have been verified by repeated use, and have become established principles; some are comparatively untried, unused and unreliable.

A description accurately framed on the knowledge we possess at any particular time remains unviolated by additions to that knowledge. Its vagueness renders judicial skill necessary in applying it to any particular case, but that vagueness tends to be diminished by use.

A definition framed on imperfect knowledge is, on the other hand, an impediment, that must be removed or evaded. It is in practice modified or got rid of by legal fiction. Its errors are met by compensating error.

¹ "Infatti la codificazione è una vera rivoluzione nella sfera della legislazione: essa chiama ad un tempo tutte le istituzioni giuridiche secolari ed immemorabili a render conto di sè: essa è il trionfo della ragion giuridica "naturale."—PESCATORE.

Legal fictions are proper temporary expedients, but they mark out defects that it is the duty of legislation to remove¹.

The general principles of Ethics, natural or moral Law, in such cases, become a guide. Positive law is reconciled to them by an evasion of such of its descriptions as are inapplicable. Its errors are thus corrected, and its omissions supplied.

As the law advances the line between judicial and legislative functions becomes more definite, and legal fictions tend to disappear.

The following quotation discloses a somewhat different form of error.

¹ Ex. Lord Coke as to murder, says: "Where a person of *sound memory* and *discretion* unlawfully killeth any reasonable creature in being, and *under the King's peace*, with *malice aforethought* either express or implied."

This is not a scientific definition because the meaning of its several terms has never been with accuracy assigned, but it is not inaccurate, and it is practically sufficient. As, however, the line between that state of the mind which constitutes sound memory and discretion, and the morbid state for which irresponsibility may be claimed has never been with certainty drawn—nor that between an unlawful and a justifiable or excusable homicide, nor that between the status which entitles to the protection of any particular government and that which does not, cases of doubt are possible. When such a case arises the court decides whether its particular facts bring it within the description.

The decisions on such cases with their facts serve to narrow, step by step, the vagueness of the description, and approximate it to the character of a definition.

This process is the right one. To frame an hypothesis that accords with ascertained facts and leave it to be narrowed by advancing knowledge is true scientific method. The whole law of homicide is now in the hands of the Recorder of London, and it is fair to assume that it will be made a model for the perfecting of law on kindred subjects.

On the other hand, the laws as to offences against property are full of erroneous definition, and its compensating legal fiction, and, as a consequence, elaborate discussions on questions not material to the merits, are still possible.

To possess—to take—to carry away, are examples of verbs that have been so employed as to make it proper and necessary to accept them in a sense that differs from their ordinary meaning.

“The enquiries of the Jurists are in truth prosecuted
 “much as enquiry in physics and physiology were prosecuted
 “before observation had taken the place of assumption.
 “Theories plausible and comprehensive but absolutely unverified, such as the Law of Nature, the social compact, enjoy a universal preference over *sober reasoning into the primitive history of Society and Law*, and they obscure the truth not only by diverting attention from *the only quarter in which it can be found*, but by that most real and most important influence, which when once entertained and believed in, they are able to exercise on the latter stages of “jurisprudence.”

The proposition, that the knowledge of a less advanced period of society is the only source of the knowledge of a more advanced period, is not *prima facie* probable, and any one who advances it should be prepared with the facts on which it is based. That physics and physiology have made their advance as a consequence of observation having taken the place of assumption, can scarcely be a reason why primitive history should be the only quarter in which truth on any other subject can be found. The proper inference is that observation should go on taking the place of assumption wherever theories are treated as facts.

That the substitution of observation for assumption is precisely what has taken place in physiology and physics cannot either be conceded. The framing of plausible and comprehensive theories is a part of the process of seeking truth. While the facts are imperfectly known, such theories are liable to be more or less erroneous, they are corrected as the knowledge of facts increases. What has taken place in physiology and physics is, that an hypothesis is now treated as such, until it has been established as an ascertained fact, by deductive method, instead of being insisted on at once as demonstrated truth, as in former times it frequently was.

The terms in which physiology and physics are spoken of in the passage quoted, are pregnant with the approbation of the Baconian method: the theory advanced is not only incon-

sistent with that method, but is expressly repudiated by Bacon.

Rerum enim inventionem a naturæ luce petendum, non ab antiquitatis tenebris repetendum esse; is his language.

Kepler, Newton, Laplace, Hervey certainly did not find the light that they shed on knowledge, "*dans les ténèbres de l'antiquité.*"

The direct proof of the proposition, that Truth in jurisprudence must be sought by the identical process by which it has been found in other subjects, lies in the fact that if we take any maxim or principle whatever that is recognised as sound law, we find that it has been either framed or matured on the observation and experience of the period in which it was successfully enunciated.

Whether we consider the bargains that people arrange with each other, the wrongs that they inflict on each other, or the promises that they make to each other, we find that we know nothing but what observation and experience have taught; and that the parts of the law that are most advanced are those in which our experience has been the greatest.

We may use the laws that have been matured by other societies, but when we do so, we do so, as far as we use them rationally, because they are based on facts similar to the facts on which our own laws must be based, and applied under conditions similar to those under which our own laws must be applied.

The Jurist who is seeking to improve the law will certainly not neglect any hint that history can give. Among his facts there are many that are permanent, and belong to the subject in every age—among the laws of the phenomena some that were successfully enunciated long ago; and there may be laws of injunction that were right in their origin, and that are right still.

There are maxims of Civil Law that have served the uses of Italian commerce of the middle ages, have passed into our laws with the commerce that passed into our hands, and have become a part of our commercial law. These maxims have

been retained, not because they can be traced in primitive history, but because they are suited to existing circumstances—because they provide for existing wants.

The laws of commerce are from time to time modified to meet modified demands upon them, and to remedy their imperfections. What these imperfections are—what the proper remedies,—observation and experience, and these alone, can teach. As far as the supply of current wants is concerned, the mine of antiquity is exhausted. The Phœnicians and the Rhodians can do no more for English commercial law than they have already long since done. The Triremes of Salamis can scarcely aid us in the structure of ships of war, now that Trafalgar as to this belongs to remote antiquity.

To the experience of contemporaries and the reasonings founded upon them, we can look with somewhat more of hope. Our nearest neighbours have laws that are, in form, more scientific than our own. The account given by Locré of his elaborate labours, shews that it is only in form¹; but we cannot afford to overlook facts that have been ascertained or rules that have been deduced from such facts by a civilization so near our own. American Jurists have also ever been treated as contributors to English legal literature.

The proposition that truth in jurisprudence must be sought by the identical process by which it has been found in other subjects, is fully recognized in the practice of institut-

¹ “Les codes ont donné lieu à une triple discussion,

“L’une dans le sein du conseil où se préparait le projet,

“L’autre au Tribunal où le projet était d’abord examiné dans des conférences privées, et ensuite soumis à une discussion publique et solennelle,

“La troisième devant le corps Législatif, où il était contradictoirement débattu entre les orateurs du gouvernement et ceux du Tribunal.

“Ces deux dernières discussions ont amené des observations officieuses, des exposés de motifs, des rapports qui se placent aussi parmi les travaux préparatoires.

“C’est de tous ces travaux réunis, rapprochés, conférés au texte des codes, et entre eux que sort l’esprit de la loi. Quoique tous ne le révèlent pas également certaine, c’est là seulement qu’on le trouve. Hors de là il n’y a qu’incertitude, tâtonnement, opinion, conjecture, et souvent erreur.”

ing special enquiries in particular cases before legislating upon them.

Impartial and scientific investigation can sometimes arrive at correct results from materials thus obtained, but the process has little in common with the patient and continuous observation that belongs to true inductive method.

Special enquiry, however, the less effective mode of arriving at facts, is generally followed with reasonable speed by legislation; while the results of continuous observation, the more effective method, are frequently neglected, or more slowly used; and it is this defect in using the materials that experience supplies, that keeps the law from acquiring a scientific character. The question is: How can this defect be remedied?

In true science a newly discovered fact is not for an instant disregarded, a detected error is not for an instant retained; and this promptitude must be employed to any subject that is to be approximated to the rank of a science.

If Law could be framed with a complete knowledge of all the circumstances to which it could possibly be applied, and be expressed in language of unmistakeable clearness, the function of judicial authority would be simply to enforce its decrees.

In fact, however, and apart from the errors of policy, there are and ever will be, errors, ambiguities and omissions in the laws, and these as a rule can only be discovered in the actual working of the system. It is in that working also and to the minds of those who are engaged in the business of deciding, and who thus have all the facts completely before them, that are suggested the rules for grouping the discovered facts and for removing the defects that are revealed.

It follows that the judge does, and must do, some of the work of the legislator. In very rude states of society he does it all; he makes the law as he wants it; and in any state of society he must, in deciding the particular case before him, remove any ambiguities and supply any omissions that exist, so far as it is necessary to enable him to do so.

The French Codes say :

“Le juge qui refusera de juger sous prétexte du silence, de l’obscurité ou de l’insuffisance de la loi, pourra être poursuivi de déni de justice.”

Omission, obscurity, and insufficiency, are here assumed to be possible, and the judge is compelled to decide the particular case before him, notwithstanding their existence.

Now it is clear that by making the law meet a case that its provisions are, in fact, inadequate to meet, the law itself must have been modified. It does not, however, necessarily follow that the modification should be further used ; its use may be limited to the particular occasion.

The French laws say :

“Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.”

And this seems to limit the uses of a decision to the particular case in which it is delivered. The English law has no such prohibition ; and although there is no such special duty imposed on a court, as that of elaborating and perfecting the law as a science, yet, if the habits of thought of the judge be such as to lead him to prefer to deal with principles, he will, if general rules exist, seek to make his particular decision a deduction from them, or will, if they do not exist, elaborately investigate existing decisions on the subject and endeavour to enunciate a rule of law that will comprise them so as to make his present decision a deduction from a general rule, instead of a mere isolated decree or a slavish copy of previous decisions.

Now this is true scientific method. The actual business of the courts supplies, almost exclusively, the facts that are necessary for the uses of the Induction, and it also suggests the hypotheses that form the successive steps in the advance ; and such of these as are enunciated as rules of law are finally tested and confirmed by this same actual employment in the real business of life.

It is, in this way, and not by actual legislation, that

these maxims of law that are most nearly scientific are framed.

It is certainly not possible to avoid the use, in some way or other, of the materials that experience is constantly accumulating, but for the purposes of science the use should be continuous and systematic. Legislative and judicial authority should be made to exercise their respective functions in complete harmony.

It is no uncommon thing to hear a legislative provision denounced from the Bench, as ambiguous, contradictory, capable of being evaded, or even as plainly and clearly enacting something different from what must necessarily have been intended. If such denunciations are justified they shew that corrections in the law, as it exists, are necessary, and they should therefore receive immediate attention, and the corrections that are shewn to be necessary should be at once applied.

Again, with whatever skill and success a general proposition of law may be enunciated by judicial authority it does not become certain law unless the authority be that of the highest court. It may be rejected in a subsequent proceeding, or adopted only after a complete rediscussion of the subject: and even when the authority of the court makes it a part of the law, it need not be, that its proper place in the system is assigned to it: it may be simply thrown upon the heap.

In the Statute Law there is an equal absence of scientific control. The portions of it that are in constant use, are from time to time consolidated and adapted to existing wants, and whether this is done by scientific or empirical skill, experience is the guide, and practical fitness more or less the result.

That no successful method has hitherto been applied to the mass of legislation, may be inferred from the fact, that many hundreds of statutory provisions are now in process of being carted away as obsolete, preparatory to the consolidation of the remainder.

Provisions that were operative, those which had become obsolete, and those which could not safely be pronounced, the one or the other had become mingled in undistinguishable confusion. Without the introduction of a skill, both mechanical and scientific, that has not hitherto been applied, this confusion must in a greater or less degree continue, or be renewed.

The existence, side by side, of systems that had sprung from different origins, and that appealed to altogether different principles, has been an insuperable impediment to scientific advance. To impose a matured system, however superior, on a community that already has a system of its own, must introduce anomalies that need not exist where the community and its laws have grown up together.

The Judicature Act, 1873, commences a change by which these anomalies will be, in time, removed from the English Law, but, beyond this, it contains, s. 75, a provision by which the necessity for continuously watching the working of the system is recognized, and by which, maintaining a communication between the Supreme Court and the legislature through the medium of a Council composed of members of the Court, is to be maintained.

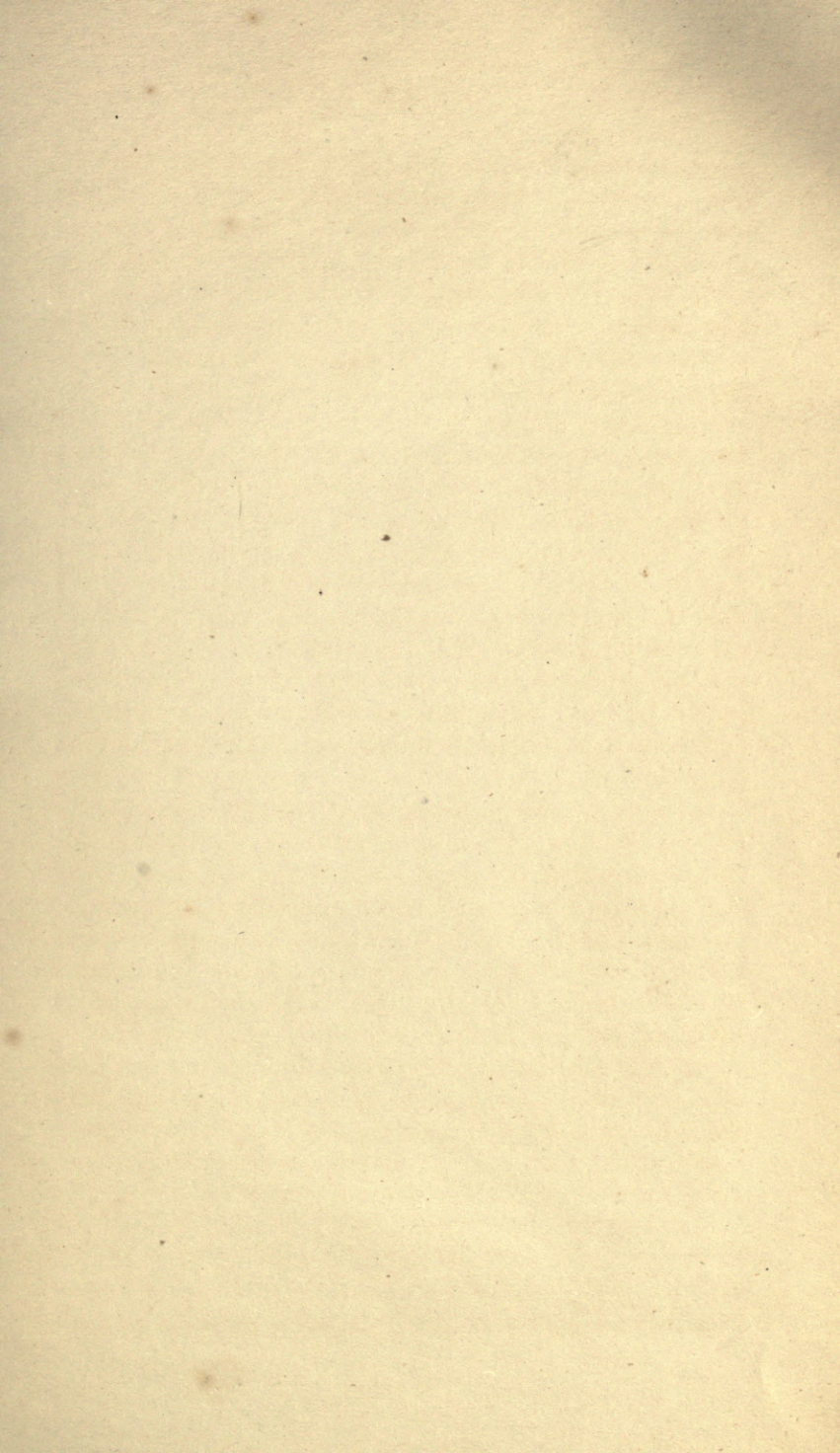
Ordinary rules of construction may limit the operation of this clause to the subject-matter of the Act, but as far as it goes it adopts a principle which would secure a steady, continuous, and systematic improvement of the law if it were to be applied to that object.

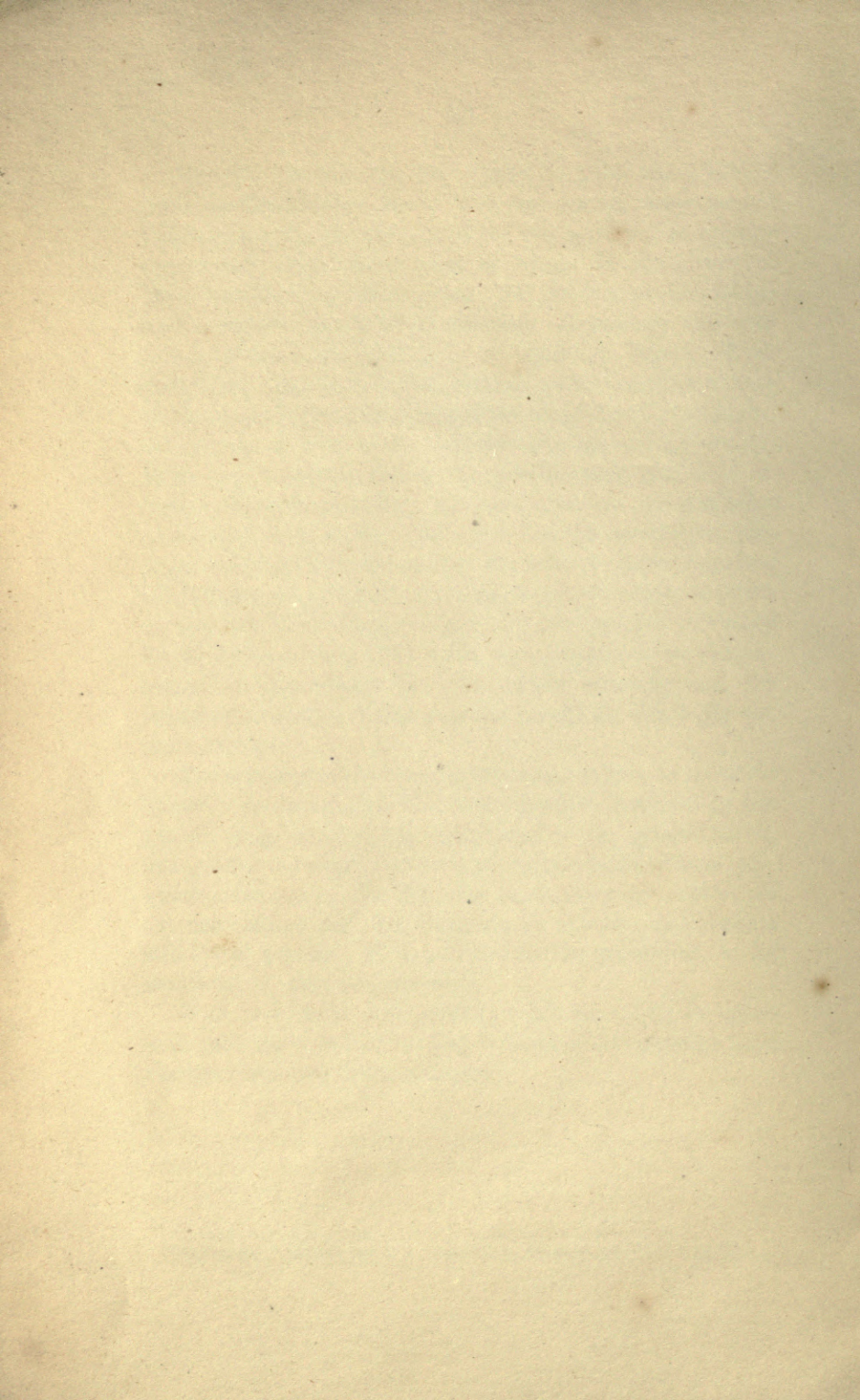
A Council with the necessary authority, and whose members possessed both practical skill and scientific attainment, could work into the legal system principles that had been enunciated in the course of judicial decision, and deprive of the rank of authorities to be followed such judgments as had been found to be useless or misleading. It could point out the legislation that was necessary for the remedying of defects that had been brought to its notice, and suggest or correct the mode and form necessary to be adopted so as best to arrive at accuracy, certainty, and perspicuity in legislation.

The sciences that are best suited to guide the habits of juridical thought are not to be found among those mental tonics whose axioms and postulates are admitted as soon as enunciated. Instruction must be sought in the history of those in which the entire process of arriving at knowledge from complete ignorance is revealed. Astronomy and chemistry possess this quality in an eminent degree. Each starts from appearances that deceive, passes through a maze of erroneous hypotheses, successively adopted and abandoned, and arrives at laws of the loftiest certainty and generality. Each, too, presents, during the pre-Baconian period of its history, hypothesis after hypothesis clung to and defended as demonstrated truth. Each has had its cultivators, who began *poser les principes*, before the subject-matter even had been clearly ascertained, and *chiedere alla metafisica le prime nozioni* instead of *alla sperienza*, each has appealed to history for what observation alone could teach, and each has demonstrated in the results that the loftiest scientific and the humblest domestic truths must be sought by identically the same method.

In sciences such as these professional labour is scientific labour; the knowledge that is incidentally acquired in the pursuit of gain is eagerly contributed to the general stock, and gratuitous labour is attracted by the fascination of progressive discovery. On the other hand, the mere practice of the law makes but few demands on science, and renders still fewer returns. It is pledged to the promotion, in its exertions, of individual interests.

It is to Judicial and legislative labour, acting in union with each other and controlled by scientific knowledge, that the law must look for its advance.





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